

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )

Personal Communications Industry )

Association's Broadband Personal )

Communications Services Alliance's )

Petition for Forbearance For Broadband )

Personal Communications Services )

Biennial Regulatory Review - Elimination )

or Streamlining of Unnecessary and Obsolete )

CMRS Regulations )

Forbearance from Applying Provisions )

of the Communications Act to Wireless )

Telecommunications Carriers )

WT Docket No. 98-100

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

REPLY COMMENTS OF  
COMCAST CELLULAR COMMUNICATIONS, INC.

Comcast Cellular Communications, Inc. ("Comcast") replies to the comments filed in the above-referenced proceeding.<sup>1/</sup> In the *Notice* the Commission requested comment on whether and how forbearance from applying the Commission's rules may be appropriate for commercial mobile radio services ("CMRS") providers. The comments show that there are a number of regulations currently in place that are ill-suited to the realities of the CMRS marketplace. More importantly for the future, a regulatory approach that favors "regulatory symmetry," without regard to fundamental differences in the markets in which telecommunications carriers operate, will not advance the prospect of full-fledged, facilities-based local competition.

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<sup>1/</sup> *In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations, Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 98-100, FCC 98-134 (released July 2, 1998) ("*Notice*").

**I. THE GOVERNING POLICY FOR CMRS SHOULD BE DEREGULATION.**

The comments filed in response to the *Notice* provide ample demonstration of how a policy predisposition in favor of regulatory symmetry apparently has eclipsed other pertinent regulatory and market considerations. Comcast and several other commenters focused particularly on the unwarranted and unnecessary regulation visited upon all CMRS providers in the name of regulatory parity or symmetry. Perhaps because of the amazing success of the CMRS industry in developing innovative services and attracting new customers, the harm of symmetry has not been immediately apparent. However, in the view of CMRS operators, the overall push toward symmetry has led toward regulations unsuited for the uniquely competitive CMRS market.

The comments of American Mobile Telecommunications Association ("AMTA"), for example, detail how the smaller CMRS providers struggle with regulations for which costs far outweigh any benefit.<sup>2/</sup> AMTA views a unified regulatory approach as inappropriate when carriers of different sizes have functional differences in system capacity, operational characteristics, and subscriber orientation.<sup>3/</sup>

The comments of Bell Atlantic Mobile ("BAM") also explain that particular requirements, such as restrictions on use of Customer Proprietary Network Information ("CPNI"), implementation of local number portability and interexchange services rate averaging have been imposed on CMRS providers in the name of regulatory symmetry, without a threshold examination of the suitability of these requirements to CMRS operations or any inquiry as to the

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<sup>2/</sup> AMTA Comments at 24-28.

<sup>3/</sup> AMTA Comments at 2.

specific practical challenges of meeting new regulatory requirements.<sup>4/</sup> Comcast agrees with BAM's assessment that the Commission's recent record of imposing new regulations on CMRS providers is contrary to the law and policy underlying the regulatory forbearance of the 1993 Budget Act.<sup>5/</sup>

The 1993 Budget Act reset the regulatory framework for mobile services. There Congress directed the Commission, first, to assume the main role in overseeing the nationwide development of CMRS and second, wherever possible, to defer to the market to govern CMRS operations.<sup>6/</sup> Yet even as facilities-based CMRS competition has increased from two carriers per market to six, the burden of new federal regulation has increased even more. The explanation for this phenomenon is contained in the *Notice* itself: the Commission apparently believes that the regulatory toolbox it was handed in the Telecommunications Act of 1996 effectively supersedes the CMRS-specific provisions of the 1993 Budget Act.<sup>7/</sup> As Comcast, BAM and AMTA demonstrated in their initial comments, this assumption is flawed as it is not based on a reading of the statute as a whole or on the statutory construction instructions Congress gave the Commission in Section 601.<sup>8/</sup> Further, this assumption has created significant dislocation and expense for CMRS providers, who, after the fact, have had to expend

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<sup>4/</sup> BAM Comments at 7-8.

<sup>5/</sup> BAM Comments at 6.

<sup>6/</sup> *See, e.g.*, BAM Comments at 3-5.

<sup>7/</sup> *See Notice* at ¶ 7 (comparing the Commission's Section 10 forbearance authority with the Commission's Section 332(c)(1)(A) forbearance authority).

<sup>8/</sup> Section 601 of the 1996 Act instructed the Commission not to construe the 1996 Act to "modify, impair, or supersede Federal, State or local law *unless expressly so provided* in such Act or amendments." Pub. L. No. 104-104, 110 Stat. 143 (1996) (emphasis added). Consequently, Section 601 requires that the Commission follow the deregulatory policies instituted by the 1993 Budget Act.

tremendous efforts — thus far without any success — to demonstrate on more than one occasion to the Commission that regulations imposed uniformly on all telecommunications carriers will lead to severe dislocations for CMRS operations and disruption of the settled expectations of CMRS subscribers.<sup>9/</sup>

The bedrock assumption for CMRS should be that deregulation is at least the preferred path if not absolutely required absent proof of marketplace abuses or harms to subscribers.<sup>10/</sup> Comcast agrees wholeheartedly with BAM that, going forward, the Commission must not impose regulations on the CMRS industry without a record basis that includes consideration of the fundamental differences between competitive and non-competitive markets and the distinct technical, functional and economic characteristics of CMRS.<sup>11/</sup>

## **II. CMRS INDUSTRY PETITIONS FOR FORBEARANCE AND RECONSIDERATION DESERVE PROMPT RESOLUTION AND A NEW FRAMEWORK FOR DISPOSING OF CMRS FORBEARANCE PETITIONS SHOULD BE ESTABLISHED.**

The Commission can more effectively advance its policies of encouraging competition by considering the distinct attributes of the industries it regulates in future rulemakings *prior* to

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<sup>9/</sup> The fact that such dislocations are unnecessary has even been acknowledged by the Commission. In a recent order the Commission noted that the 1996 Act does not mandate regulatory symmetry. Quoting prior orders, the Commission stated “[a]s the Commission has previously explained: “non-discriminatory and competitively neutral’ treatment does not necessarily mean ‘equal’ treatment.” . . . “Competitive neutrality . . . would not, however, preclude carriers in dissimilar situations from being treated differently.” See *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, CCB Pol 97-1, FCC 98-205 (released Aug. 24, 1998) at 7 n.24 (internal citations omitted).

<sup>10/</sup> See, e.g., BAM Comments at 8-9 (“This approach contradicts the Commission’s own declarations in earlier decisions implementing Section 332, that the *agency* bears the burden of justifying CMRS regulations, and will impose rules only when there is a compelling need to do so.”) (emphasis in original).

<sup>11/</sup> BAM Comments at 1.

imposing uniform regulation. Even if the Commission realigns its future policy making, however, that will not fix the problem of inappropriate rules that are currently in place. As BAM observes, there are numerous petitions for reconsideration and forbearance regarding matters of vital importance to the CMRS industry that are languishing for want of Commission action.<sup>12/</sup>

The real problem is the inevitable inertia that operates once a rule of general application is imposed. It is simply harder for the Commission to grant a forbearance petition or petition for reconsideration than it would have been to have analyzed in the first instance whether the application of a general rule was necessary or appropriate. While CMRS providers await Commission action, they are forced to comply with rules that are, at best, inappropriate and, at worst, actually harmful to the development of the CMRS industry as well as anti-competitive.<sup>13/</sup>

Comcast agrees with BAM that Commission resources are better spent not on a general inquiry into the forbearance process but rather on resolving the many long-pending proceedings to modify or remove unwarranted CMRS regulations.<sup>14/</sup> Particularly in instances where the record shows that current rules are imposing significant and needless expense on the CMRS industry and disruptions to CMRS customers, the Commission must break this status quo and take decisive action without delay to resolve the outstanding issues critical to CMRS operators.

In its comments, Comcast demonstrated that the uniform application of rules for CPNI and universal service, for instance, have had a disproportionately negative effect on CMRS operators. Comcast believes that a revision in the reconsideration process could alleviate some of the unnecessary burdens of new regulation while the Commission is considering a request

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<sup>12/</sup> BAM Comments at 11-14.

<sup>13/</sup> See, e.g., AMTA Comments at 24-28, BAM Comments at 7-8, Comcast Comments at 14-22.

<sup>14/</sup> BAM Comments at 11.

from a CMRS provider for reconsideration or for forbearance. For example, once a petition is filed that demonstrates that a certain rule will have a disproportionately adverse impact on CMRS providers and likely needs clarification, modification or elimination, the Commission should stay the effectiveness of the rule or rules at issue pending a decision on the petition. This approach would be justified by the showings made by the CMRS industry in the CPNI rulemaking, local number portability implementation and in the Universal Service proceeding pending resolution of the critical CMRS-specific issues that remain unresolved.<sup>15/</sup>

### **III. ONLY LIKE SERVICES SHOULD BE REGULATED IN THE SAME MANNER.**

A striking development in this proceeding is that two direct, long time competitors, Comcast and BAM, are in complete agreement as to the role Commission regulation should play in the CMRS market. BAM is Comcast's primary competitor in the greater Philadelphia area wireless market and Comcast has, in fact, in the past brought complaints before the Commission about anti-competitive behavior by BAM's parent company involving BAM.<sup>16/</sup> Given this history, it is ironic that both Comcast and BAM seek Commission reassessment of its policy of regulatory symmetry and a return to the deregulatory trajectory it once followed so that CMRS providers can focus their energies on competing for customers.<sup>17/</sup>

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<sup>15/</sup> See, e.g., Comcast Comments at 14-22; BAM Comments at 7-8, 11-14. Comcast notes that the Commission has properly stayed the implementation of Section 254(g)'s interexchange services rate averaging on CMRS providers pending reconsideration. See *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Order, 12 FCC Rcd 15739 (1997).

<sup>16/</sup> See, e.g., *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Reply Comments of Comcast Cellular Communications, Inc., WT Docket No. 96-162, GEN Docket No. 90-314, FCC 96-319 (filed Oct. 24, 1996) at 3-5

<sup>17/</sup> Both Comcast and BAM have demonstrated that there is nothing in a deregulatory  
(continued...)

Any rationale for a policy of regulatory symmetry or parity breaks down if the services being subjected to a common framework are not similar services. While commenters agree that the CMRS marketplace is robustly competitive,<sup>18/</sup> despite the promise of direct CMRS-to-landline local competition, CMRS carriers are not yet functioning in any significant way as competitors to landline local exchange carriers.<sup>19/</sup> Incumbent LECs and CMRS providers may be both telecommunications carriers, but the markets that they serve have entirely distinct characteristics and service penetration. It is wrong simply to stop all inquiry at the "telecommunications carrier" label. This fails to recognize that ILEC services and CMRS services are not like services that should be subject to like forms of regulation.

Review of the Commission's legal precedent in the area of like services illustrates this point. A basic element of any Commission analysis of likeness is whether, in the minds of most customers, two services are perceived as "functionally equivalent" and are, therefore, "like" services.<sup>20/</sup> While mobile wireless and landline local service are in some sense equivalent in that they both allow voice transmissions, there are overwhelming dissimilarities in the nature of the

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<sup>17/</sup> (...continued)  
approach for CMRS that contradicts the general requirements of the 1996 Act.

<sup>18/</sup> See, e.g., AMTA Comments at 3, BAM Comments at 6, Comcast Comments at 3. See also Third CMRS Competition Report, FCC 98-91, released June 11, 1998.

<sup>19/</sup> While earlier this year in the BellSouth Louisiana Section 271 Order, the Commission acknowledged that under appropriate circumstances PCS providers could be considered facilities-based local service competitors, the Commission observed that BellSouth would have to demonstrate that PCS was in fact an actual commercial alternative for telephone exchange service. The Commission concluded that while PCS is "positioning their service offerings to be competitive with wireline" it is still basically a "complementary telecommunications service." *BellSouth Section 271 Application for Louisiana*, Memorandum, Opinion and Order, CC Docket No. 97-231, released February 4, 1998 at ¶ 72.

<sup>20/</sup> See, e.g., *AT&T Communications; Revisions to Tariff F.C.C. No. 12.*, Memorandum Opinion and Order, 4 FCC Rcd 4932, 4935 n.41 (1989) (citing *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982)).

services provided, including how they are sold, priced and packaged, and their actual as well as perceived functionalities.<sup>21/</sup> Any likeness analysis also would take into account the competitive nature of the CMRS market and the striking differences in penetration and customer choice available in the wireless and landline markets.

Since CMRS and wireline services are not "like," there is no reason to require they coexist under the same regulatory framework. Given the records developed in numerous proceedings on the different needs of CMRS providers it is, in fact, wrong for the Commission not to exercise its authority to regulate the CMRS and the landline industries differently. If the Commission's unstated goal in imposing uniform regulation is to make CMRS facilities-based carriers "competitive" with landline carriers, there are substantially better and more constructive ways to encourage this outcome.<sup>22/</sup>

#### IV. CONCLUSION

Comcast agrees with BAM's comment that the Commission lacks the authority to "raise the bar" for deregulation of CMRS providers.<sup>23/</sup> As direct competitors in an intensely competitive CMRS market, BAM and Comcast both have urged the Commission not to regulate

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<sup>21/</sup> Under the functional equivalency approach, it would make sense for the Commission, for example, to conclude that analog and digital cellular are like services, which is acknowledged by the fact that both analog and digital are CMRS.

<sup>22/</sup> See, e.g., *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Comments of Comcast Cellular Communications, Inc., WT Docket No. 96-162 (filed Oct. 3, 1996); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Joint Petition for Reconsideration and Clarification of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc., CC Docket No. 96-98, CC Docket No. 95-185 (filed Sept. 30, 1996).

<sup>23/</sup> BAM Comments at 11.

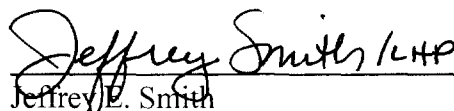


CMRS based on models of the LEC industry, but based on what makes sense for a competitive market.

Further, as noted by AMTA, the burden should be on those seeking additional regulation of CMRS to prove that such regulation is truly needed, not on CMRS providers to prove that additional regulation is unnecessary.<sup>24/</sup> Because, however, there are already uniform rules in place that must be reconsidered, clarified or eliminated, the Commission should quickly resolve the outstanding CMRS issues squarely posed and pending in the CPNI, number portability, Section 254(g) and Universal Service dockets. Then, with past problems solved, the Commission can move forward along the deregulatory path it has used before to promote true facilities-based telecommunications industry competition.

Respectfully submitted,

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September 2, 1998

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<sup>24/</sup> AMTA Comments at 24.

## CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a legal secretary for Dow, Lohnes & Albertson hereby certify that on this 2nd day of September 1998, I served by first-class United States Mail, postage prepaid, a true copy of the foregoing **REPLY COMMENTS OF COMCAST CELLULAR COMMUNICATIONS, INC.**, upon the following:

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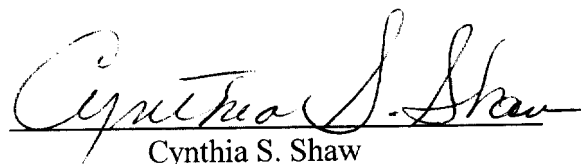
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